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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VILLAGE OF MILFORD,

Petitioner,

v.

PROFESSIONAL LAWN CARE ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Patti A. Goldman
(Counsel of Record)
Alan B. Morrison
Brian Wolfman

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

QUESTION PRESENTED

Does the Federal Insecticide, Fungicide and Rodenticide Act impliedly preempt all local regulations that relate in any way to the use of pesticides, even where the Act does not address the subject of the local regulation and the relevant federal agency has taken no action dealing with that subject?

PARTIES TO THE PROCEEDINGS BELOW

The respondent, the Professional Lawn Care Association, was the plaintiff in the district court and the appellee in the court of appeals. The petitioner, the Village of Milford, was the defendant in the district court and the appellant in the court of appeals. The National Pest Control Association filed an *amicus curiae* brief in the court of appeals in support of respondent.

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PROFESSIONAL LAWN CARE ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not yet reported, but is reproduced in the Appendix ("App.") at pages 1a-26a. The order and oral ruling

of the United States District Court for the Eastern District of Michigan are not reported and are reproduced at 27a-34a.

JURISDICTION

The judgment and opinion of the court of appeals were entered on August 1, 1990. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND ORDINANCE INVOLVED

The Federal Insecticide, Fungicide and Rodenticide Act provides, in pertinent part:

> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act.

7 U.S.C. § 136v(a).

Village of Milford Ordinance No. 197 is reproduced in the appendix at 35a-40a.

STATEMENT OF THE CASE

This case presents an important question concerning whether the lower courts correctly held that the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 *et seq.*, impliedly preempts a local ordinance that requires commercial pesticide users to register with the locality and to post certain warnings when they apply pesticides, even though nothing in FIFRA or the regulations implementing it remotely deals with these subjects. In order

to answer the preemption question, it is necessary to examine FIFRA, Congress's goals in passing and amending it, and the relevant local ordinance to see whether Congress intended to bar local regulations of this type.

A. The FIFRA Scheme

When it was first enacted in 1947, FIFRA was essentially a misbranding statute designed to eliminate unwarranted manufacturer claims and to ensure that product labels contained directions that would prevent injuries to both applicators and crops. U.S. General Accounting Office, *Nonagricultural Pesticides: Risks and Regulation*, at 9 (1986). However, it did not protect the public from the adverse effects of pesticide use. Act of June 25, 1947, ch. 125, 61 Stat. 163 (1947).

In 1972, Congress amended FIFRA to take into account an increasing body of scientific evidence indicating that pesticide use poses risks to human health and the environment. *See* Pub. L. No. 92-516, 86 Stat. 996 (1972); H.R. Rep. No. 511, 92d Cong., 1st Sess. 4 (1971). As amended, FIFRA establishes a registration scheme for pesticides under which the Environmental Protection Agency ("EPA") determines which pesticides can be safely used and for which purposes. 7 U.S.C. § 136a(c)(5)(C). Where the use of a pesticide will have an adverse effect on human health or the environment that outweighs its benefits, the EPA may prohibit that use. *Id.* §§ 136a(c)(5)(C), 136d(b) and 136(bb).

While EPA decides which pesticides may be registered for which uses, FIFRA gave it no mandate to provide public notice of pesticide use or its hazards, and EPA has not entered this field on its own. Instead, the only type of notice envisioned by FIFRA, and the only one required by EPA pursuant to FIFRA, is intended to warn those who apply pesticides for

a living, but not the general public, of the dangers of pesticides. *See* 7 U.S.C. § 136a(d)(1)(C); 40 C.F.R. § 152.175. Similarly, EPA's labeling authority under FIFRA, which concerns the written material attached to the pesticide container, is designed not to inform members of the public who may come into contact with pesticides, but rather to protect pesticide purchasers against fraudulent claims concerning a pesticide's composition and effectiveness and to ensure proper application of the chemical. *See* 7 U.S.C. § 136(p); 40 C.F.R. § 156.10; *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 119 (2d Cir. 1989).

FIFRA contains no preemption provision dealing with public notice, but it does have one concerning product labeling, under which a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act." 7 U.S.C. § 136v(b). In addition, FIFRA contains an anti-preemption provision, which expressly authorizes state pesticide regulation as long as the state does not undercut federal restrictions on the sale or use of pesticides:

> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act.

7 U.S.C. § 136v(a).

It is this anti-preemption provision and, more particularly, certain congressional statements accompanying its passage that form the sole basis of respondent's claim that local governments are barred from passing laws that affect pesticide use in any way. Those statements were made in the course of

a debate in Congress over whether to preempt local authority over pesticides expressly.

On the one hand, the House Committee on Agriculture and the Senate Committee on Agriculture and Forestry wanted to prohibit local pesticide regulation in order to avoid local duplication of federal and state standards, and because they believed that local governments lack the scientific expertise necessary to make informed regulatory judgments about whether to allow particular pesticide uses. H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971); S. Rep. No. 838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4008. On the other hand, the Senate Committee on Commerce, which also had jurisdiction over the legislation, wanted to preserve full local authority to regulate pesticides. S. Rep. No. 970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code. Cong. & Ad. News 4092, 4111-12.

In intensive negotiations to resolve this and other disputed issues, the Senate subcommittee chairmen approved a compromise bill that neither authorized nor prohibited local governments from regulating pesticides, and both Houses of Congress adopted that bill without further changes on this issue. *Id.* at 4086-88; *see also* C. Bosso, *Pesticides & Politics: The Life Cycle of a Public Issue* 171 (1987). As a result of this stalemate over whether to preempt local authority expressly, FIFRA is silent on the power of local governments to regulate pesticides, including the power to issue regulations that operate in areas that are not covered by the federal scheme.

B. The Village of Milford Ordinance

Although the State of Michigan has established a regulatory scheme that supplements federal regulation under FIFRA, that scheme, like FIFRA, does not attempt to regulate public

notice of the use of pesticides. Pesticide Control Act, Mich. Comp. Laws §§ 286.551 *et seq.* To fill this void, and to address the particular health problems suffered by several of its residents as a result of the undisclosed use of pesticides, the Village of Milford enacted Ordinance No. 197. App. 35a-40a.

The Milford Ordinance has four basic requirements, all of which were found to be preempted. First, it requires commercial pesticide users to pay a $15 annual fee to the Village and to file a statement with the Village and the fire department containing the user's name, address, and telephone number, as well as the generic chemical name of any pesticides to be used in the Village. Ordinance No. 197, § 3, App. 36a-37a. Second, the Ordinance requires pesticide users to "provide and place a yardmarker containing the words, 'Chemically Treated Lawn -- Keep Children and Pets Off for 72 Hours' on the property following an outdoor application," and it prohibits property owners from removing such signs during that 72 hour period. *Id.*, § 5(B)-(D), App. 38a-39a. Third, pesticide users must provide advance notice of outdoor spraying to any Milford residents, of which there are three, who have been certified by a physician as being chemically sensitive and who have paid a $15 annual fee to the Village. *Id.*, § 5(A), App. 38a. Finally, in addition to notice of outdoor pesticide applications, the Milford Ordinance also directs pesticide users to post a notice on commercial and public buildings (including municipal office buildings and public schools) in which pesticides have been applied and to keep the notice in place for 90 days or until the next spraying. *Id.*, § 4, App. 37a-38a.

The Milford Ordinance does not prohibit or restrict the use of any federally approved pesticides. Nor does it second-guess any other determinations made by the EPA or the State of Michigan. Rather, it supplements federal and state regulation with informational public notice requirements designed

to protect local residents by giving them important information to protect their health.

C. Proceedings Below

Respondent, an association of businesses that provide commercial lawn care services, brought this action for declaratory and injunctive relief under 28 U.S.C. § 1331, claiming that the Milford Ordinance is preempted by FIFRA. At the conclusion of a hearing on the parties' cross-motions for summary judgment held on August 24, 1989, the district court rendered an oral opinion setting aside the Milford Ordinance. App. 27a-32a.

The court noted that there were then two conflicting published decisions on the question. App. 31a. In the first, the California Supreme Court, in a 5-2 split on this issue, upheld a local ordinance banning aerial spraying of certain herbicides, ruling that the FIFRA provision allowing state pesticide regulation, 7 U.S.C. § 136v(a), does not deprive local governments of any authority over pesticides and leaves the states with full authority to delegate their powers to localities. *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 491-92, 494, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984) (*en banc*). In addition, that court concluded that Congress resolved the dispute over this issue by way of a compromise, which neither authorized nor prohibited local regulation, and, therefore, the legislative history did not supply the clear intent to preempt local authority that is required by this Court's preemption cases. 36 Cal. 3d at 492-93.

In the other case, *Maryland Pest Control Ass'n v. Montgomery County, Maryland*, 646 F. Supp. 109 (D. Md. 1986), the district court held that FIFRA preempted two local public notice ordinances, and the Fourth Circuit affirmed that ruling

in an unpublished decision. 822 F.2d 55 (4th Cir. 1987). The district court reasoned that the FIFRA provision *authorizing* supplemental state regulation *deprived* local governments of similar authority to regulate pesticides because FIFRA's definition of the term "state" in 7 U.S.C. § 136(aa) does not include local governments. 646 F. Supp. at 111. Moreover, because FIFRA had not been amended to authorize supplemental local regulation in keeping with the Senate Commerce Committee's views, the Maryland court in contrast to the California Supreme Court concluded that Congress meant to adopt the views of the House and Senate Agriculture Committees in favor of preempting local authority. *Id.* at 110-13. In reaching this conclusion, the court never considered whether this congressional intent to preempt local regulation extended to matters, such as public notice, that are wholly outside FIFRA's reach.

In this case, the district court found the question both "interesting" and "very close," App. 27a-28a, but nevertheless adopted the approach in *Maryland Pest Control Association* and found that FIFRA preempts the Milford Ordinance. App. 32a. In addition to relying on the Maryland case, the court explained its rationale as follows: "Congress clearly intended, in my opinion, to preempt this entire field and then it specifically gave states the right to operate within the field . . .." App. 32a.

The court of appeals affirmed. The majority opinion began by recognizing the ever-expanding split in authority on the preemption issue, which now includes the Fourth Circuit and the Wisconsin Supreme Court finding preemption and the California Supreme Court, the Supreme Judicial Court of Maine, and the United States District Court for the District of Colorado rejecting preemption. App. 8a-9a. *Compare Maryland Pest Control Ass'n, supra*, and *Mortier v. Town of*

Casey, 154 Wis. 2d 18, 452 N.W.2d 555 (1990) (*cert.* petition No. 89-1905 filed June 5, 1990), *with Mendocino County, supra, Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990), and *COPARR, Ltd. v. City of Boulder*, 735 F. Supp. 363 (D. Col. 1989) (appeal No. 89-1341 pending 10th Cir.). Next, the majority stated that FIFRA is a sweeping regulatory scheme that "cast[s] a regulatory net over pesticides and their use, in part by giving the EPA enforcement authority over the use, sale and labeling of pesticides." App. 10a. Without reviewing the details of federal authority and regulation under FIFRA to determine whether it extends to public notice regulations like the Milford Ordinance, the majority found preemption of the Milford Ordinance because it improperly imposes additional requirements that pesticide users must follow when applying federally approved pesticides. App. 7a-8a, 9a-11a.

Judge Nelson filed a concurring opinion in which he acknowledged that the issue is a difficult one: "I cannot say the issue is not 'doubtful;'" "I consider this a close case;" and "this case presents an important question the proper resolution of which is by no means free of doubt." App. 13a, 26a. He disagreed with the majority's reliance on the statute for its finding of preemption because FIFRA "manifests a clear intent *not* to preempt all state regulation," and it does not bar states from delegating that authority to local governments. App. 13a (emphasis in original). However, he nonetheless concurred in the result because he found an intent in the legislative history to allow states, but not local governments, to supplement FIFRA's standards. App. 18a-26a.

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether Congress has stripped local governments of all authority to

regulate matters related to pesticide use. There is a split among the federal circuit courts and the state courts of last resort on the general question of whether the statute and its legislative history evince a clear congressional intent to preempt local authority over pesticide use. However, even if the congressional intent is sufficiently clear to warrant a finding of preemption of *some* local authority, the lower court erred in finding preemption of *all* local authority, even over matters that are not regulated by FIFRA and that were never identified as concerns by the relevant congressional committees that favored preemption of local prohibitions on the use of pesticides. By failing to distinguish between those types of pesticide regulation within FIFRA's reach and those outside it, the Sixth Circuit, like the Fourth Circuit, found implied preemption of local matters that are wholly untouched by the federal scheme. Accordingly, this Court should grant review this case, along with the pending Wisconsin case, in order to resolve the conflict over whether there is any implied preemption of local authority, and if there is, to decide whether public notice requirements of the type at issue here, which are outside FIFRA's scope, are nonetheless preempted.

I. THERE IS A CONFLICT AMONG THE CIRCUITS AND STATE COURTS OF LAST RESORT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

As a result of the Sixth Circuit's decision, there is now an even split among the courts that have addressed the issue over whether FIFRA preempts local authority to regulate pesticide use. On the one hand, two state courts of last resort and one federal district court have found that FIFRA does not preempt all local authority. On the other hand, one state court of last resort and two federal circuit courts of appeal have held that FIFRA preempts all local authority over pesticides. This

Court should decide this issue in order to prevent needless future litigation.

Since the district court issued its decision in this case, two other courts have joined the California Supreme Court in rejecting a preemption challenge to local regulations. *See Mendocino County, supra.* In *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990), the Maine Supreme Judicial Court held that FIFRA does not preempt a local ordinance that prohibits the commercial spraying of herbicides for non-agricultural uses unless the spraying is first approved by a town meeting vote. It found no clear congressional intent in either FIFRA or its legislative history to exclude local governments from the field of pesticide control. *Id.* at 1193-94.

In *COPARR, Ltd. v. City of Boulder,* 735 F. Supp. 363, 366-67 (D. Col. 1989), the district court likewise found no congressional intent to bar all local regulation of pesticides. Accordingly, the court upheld a local ordinance that requires public notice of all aerial sprayings and of applications by any means of pesticides in lakes, observing that there is no conflict between the notification requirements and the federal-state regulatory scheme. *Id.* at 367. However, recognizing the potential for an actual conflict between local and federal enforcement efforts, the district court struck down another ordinance that allowed the city to enforce FIFRA and its implementing regulations. *Id.* After the district court ruling, the City of Boulder repealed the enforcement ordinance. Subsequently, the plaintiff COPARR, an association of commercial pesticide applicators, appealed the ruling concerning the public notice ordinance. That issue has been fully briefed but has not yet been set for argument. No. 89-1341 (10th Cir.)

On the other side of this issue, the Wisconsin Supreme Court by a vote of 4-3 recently lined up with *Maryland Pest Control Association*, in finding preemption of a local pesticide regulation. *Mortier v. Town of Casey*, 154 Wis. 2d 18, 452 N.W.2d 555 (1990). The Wisconsin ordinance required a local permit before pesticides could be applied aerially to private lands, or by any means to public lands or to private lands subject to public use. Although the majority concluded that FIFRA's statutory language is too ambiguous to evince a clear congressional intent to preempt all local regulation, 154 Wis. 2d at 24-25, it found the requisite intent in the 1972 legislative history and struck down the regulation on that basis. *Id.* at 24-25, 30-31. Three justices dissented, finding the statute silent on the local preemption issue, and construing the legislative history to be an agreement by the pertinent Senate committees to disagree on this question. *Id.* at 33, 35-38, 44. A petition for a writ of certiorari is pending. *Wisconsin Public Intervenor v. Mortier*, No. 89-1905 (filed June 5, 1990).

In this case, the Sixth Circuit entered the fray on the side of preemption. As discussed above, the majority relied on FIFRA's overall comprehensiveness to find preemption of the entire field of pesticide regulation, without distinguishing between those matters that are covered by FIFRA and those that are not. App. 7a-8a, 9a-11a. Emphasizing the weakness of the evidence of a congressional intent to preempt local authority, the concurrence nonetheless found such an intent in the 1972 legislative history, although it never considered whether that history supported preemption of the limited type of regulation at issue here. App. 18a-26a.

As this discussion shows, the courts are hopelessly deadlocked over whether FIFRA preempts local authority to regulate pesticides. Counting the dissenting opinions in the California and Wisconsin cases, and the concurrence in the

Sixth Circuit, there are more than eleven opinions analyzing the statute and its legislative history. Thus, there has been ample percolation of the issues. At this juncture, further litigation in the lower courts would only serve to waste judicial resources and confound local governments as to their proper role in the area of pesticide regulation. In order to avoid unnecessary additional litigation over this question, and to clear up the confusion now surrounding it, this Court should decide whether FIFRA preempts local authority to regulate pesticides and if so, the extent of that preemption.

II. THE SIXTH CIRCUIT'S APPROACH CONFLICTS WITH THIS COURT'S PREEMPTION ANALYSIS.

Review is also warranted because the Sixth Circuit ignored this Court's admonition to refrain from finding preemption in the absence of "an unambiguous congressional mandate to that effect," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963), particularly where the federal scheme would supplant state or local health and safety regulation. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (historic police powers are not superseded by federal law "unless that was the clear and manifest purpose of Congress"). In this case, the lower courts found preemption based on an anti-preemption provision authorizing state but not local regulation, and on isolated congressional statements favoring preemption that are counterbalanced by similar statements opposing it, without any definitive resolution of that dispute. As the district court and the concurrence in the court of appeals emphasized, this case presents "a very close question," the proper resolution of which is "by no means free of doubt." App. 28a, 13a, 26a. Similarly, the dissenting opinion in the Wisconsin case noted that the conflicting interpretations reached by the many courts that have addressed the preemption issue "[p]ut in their best light . . .

suggest that the legislative history surrounding the enactment of FIFRA is ambiguous." *Mortier v. Town of Casey*, 154 Wis. 2d at 39. In finding preemption on this record, the Sixth Circuit failed to heed this Court's direction that preemption can be found only where Congress has evinced an unmistakable and unambiguous intent on the issue.

Aside from erring in finding local preemption based on such meager evidence of a congressional intent to that effect, the Sixth Circuit also erred in barring *all* local pesticide regulation, even of matters that are not covered by FIFRA or regulated by EPA, based on that purported intent to preempt *some* local pesticide regulation. In doing so, the lower court failed to follow this Court's analysis for deciding whether Congress has preempted a particular type of regulation and whether a state or local requirement falls within the preempted area.

Since FIFRA contains no express preemption provision, local authority can be preempted only if the federal scheme is so pervasive that it leaves no room for supplementation, or if there is a conflict between a particular local and federal regulation. *See Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1150-51 (1988); *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). In deciding whether a particular field has been fully occupied by the federal scheme, this Court has carefully analyzed the extent of federal regulation and the reasons why Congress favored excluding states or localities from the field. Based on this analysis of the statute and its purpose, the Court has narrowly defined the preempted field, and struck down only those state or local regulations that in fact undermine the federal scheme. *See, e.g., Hillsborough County*, 471 U.S. at 717-18 (the mere existence of comprehensive federal

regulation does not automatically preempt state and local supplementation).

Thus, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 205, 212-13 (1983), the Court held that the Atomic Energy Act occupied only that portion of the field of nuclear power regulation that is based on radiological safety, leaving states free to regulate in pursuit of other interests, even where the state regulation has an incidental effect on safety. Furthermore, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249-56 (1984), the Court held that the preempted field of nuclear safety regulation did not bar state punitive damages awards, which obviously have some effect on safety, because there is no irreconcilable conflict between the two and because state punitive damages awards would not frustrate the purposes of the federal law. Just last term, the Court again rejected a claim that all state regulation bearing some relation to the field of nuclear safety is preempted by the Atomic Energy Act. *English v. General Electric Co.*, 110 S. Ct. 2270 (1990). Instead, the Court concluded that a state infliction of emotional distress lawsuit was not preempted because it had only a remote connection to the preempted field of nuclear safety. *Id.* at 2277-78.

In contrast to the approach adopted by this Court, the Sixth Circuit, like most of the other lower courts that have decided the issue, failed to evaluate the scope of FIFRA regulation and the nature of the local regulation at issue. Instead, the lower courts have assumed that Congress intended to bar any and all local pesticide regulations, even though the field of pesticide regulation is potentially vast, and FIFRA occupies only portions of it.

FIFRA prohibits the marketing and use of any pesticide that is either not registered with the federal government or not accompanied by a federally approved label. 7 U.S.C. §§ 136a(a), 136j(a), and 136v(b). As a result, the federal government (in conjunction with the states in some instances, *see* 7 U.S.C. § 136v(a)) decides which pesticides can be sold and used, for which purposes, with what restrictions, and with what labels. In this context, local bans on the use of particular pesticides, local permitting systems, and local bans on aerial spraying -- none of which are at issue here -- may conceivably be preempted because they directly affect or even conflict with federal pesticide regulation.

In contrast, FIFRA is silent with respect to the public notice requirements at issue here, and the EPA has never adopted any such requirements. Moreover, public notice will have at most an incidental effect on federal pesticide regulation. Accordingly, under this Court's precedents, there is no basis for finding preemption of local public notice regulations on the ground that the federal government has occupied that field or that the local regulations conflict with, or are inconsistent with, federal law. *See* cases discussed *supra* at pp. 14-15; *see also North Dakota v. United States*, 110 S. Ct. 1986, 1997-98 (1990) (federal liquor procurement law designed to ensure lowest prices does not preempt state reporting and labeling requirements because they have only an incidental effect on cost).

Indeed, the portions of FIFRA and its legislative history that support preemption extend only to the types of regulation that are incorporated into the federal regime. Thus, section 136v(a), which expressly authorizes state regulation of the sale and use of pesticides, merely preserves state (but perhaps not local) authority to enter into fields of pesticide regulation that might have been preempted in the absence of the provi-

sion. Moreover, there is nothing in the 1972 legislative history to suggest that Congress was concerned about local notice regulations. Instead, the congressional statements favoring preemption of local authority disclose no more than a desire to avoid local duplication of federal and state regulation and to preclude local governments from making judgments that require scientific expertise that they do not have and cannot afford to acquire. H.R. Rep. No. 511, *supra*, at 16; S. Rep. No. 838, *supra*, 1972 U.S. Code Cong. & Ad. News at 4008.

Ignoring this Court's direction to consider the precise nature of the federal and local regulation at issue, the Sixth Circuit simply assumed that FIFRA is comprehensive in all conceivable areas of pesticide regulation, and that it, therefore, preempts *all* local regulation relating in any way to the use of pesticides. Thus, the Sixth Circuit invalidated not only the Milford Ordinance's public notice requirements, but also its requirement that commercial pesticide users pay a $15 annual fee and inform the Village and the fire department of their name, address, telephone number, and the generic chemical name of pesticides that will be used in the Village. The lower court's ruling even struck down the provision of the Milford Ordinance that requires that notices be posted on public buildings when pesticides are applied.

Furthermore, the Sixth Circuit's approach would preclude local regulation of a wide range of other matters that likewise have, at best, an incidental effect on federal regulation under FIFRA. For example, it would prohibit local ordinances that bar the application of pesticides in schools and child care facilities when children are present, or that require landlords to notify tenants before spraying pesticides in common areas. It might also bar local governments from inspecting and closing food establishments that serve food contaminated by rat poisoning, or from mandating that trucks refrain from

carrying open containers of pesticides on residential streets. Certainly, all local authority cannot be curtailed simply because it concerns the use of pesticides, as the Sixth Circuit ruled. Instead, for preemption to occur, the local regulation must, at the very least, involve a matter that is actually regulated or specifically exempted from regulation by the federal government under FIFRA. It is the Sixth Circuit's expansive finding of preemption of all local pesticide regulation that violates this Court's directions and further justifies plenary review by this Court.

* * *

The petition in this case should be granted because there is a split among the federal circuit courts and the state courts of last resort on the question of whether FIFRA preempts local authority to regulate pesticides. In this respect, this petition presents the same question as the petition involving the Wisconsin permitting system. *Wisconsin Public Intervenor v. Mortier,* No. 89-1905 (filed June 5, 1990). However, this case is worthy of this Court's review regardless of whether it decides to hear *Wisconsin Public Intervenor* because this case concerns a local regulation that does not even arguably implicate federal requirements, as the Wisconsin law does. Thus, even if the split in authority is resolved in favor of preemption of some local authority over pesticides, the Court should take this case to decide the extent of that preemption.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Patti A. Goldman
(Counsel of Record)
Alan B. Morrison
Brian Wolfman

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

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No. 89-2141

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PROFESSIONAL LAWN CARE ASSOCIATION,
Plaintiff-Appellee,
v.
VILLAGE OF MILFORD,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed August 1, 1990

Before: MILBURN and NELSON, Circuit Judges; and ENGEL, Senior Circuit Judge.

MILBURN, Circuit Judge, delivered the opinion of the court, in which ENGEL, Senior Circuit Judge, joined. NELSON, Circuit Judge, (pp. 13-26) delivered a separate concurring opinion.

MILBURN, Circuit Judge. The defendant-appellant, Village of Milford, Michigan, enacted Ordinance No. 197, which imposes registration, posting and notice requirements upon commercial "users of pesticides." The district court enjoined the village from enforcing the ordinance on the ground that it was impliedly preempted by the Federal Insecticide, Fungi-

cide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. The village then filed this timely appeal. For the reasons that follow, we affirm.

I.

A.

Defendant-appellant Village of Milford is a political subdivision of the State of Michigan. Plaintiff-appellee Professional Lawn Care Association of America is a national organization that represents approximately 1,400 commercial lawn care companies, including seven that are located in the village.

On January 27, 1986, the village enacted Ordinance No. 197, entitled

> AN ORDINANCE TO PROVIDE FOR THE PUBLIC HEALTH AND SAFETY BY REQUIRING REGISTRATION OF PERSONS APPLYING PESTICIDES FOR HIRE WITHIN THE VILLAGE OF MILFORD AND PUBLIC NOTICE OF THE USE OF PESTICIDES; TO PROVIDE THE PUBLIC THE OPPORTUNITY OF AVOIDING CONTACT WITH THESE PESTICIDES: AND TO IDENTIFY THE LOCATION OF FLAMMABLE PESTICIDES.

The ordinance defines a "user of pesticide" as:

> (1) Any person who applies or causes pesticides to be applied to property by any means where such person is engaged in applying pesticides for hire to trees, lawns, shrubs, plants, or the atmosphere; or
>
> (2) Any person who applies or causes pesticides to be applied in commercial businesses and public buildings.

The ordinance requires all users of pesticides who use and apply pesticides for hire within the village to register with the village and pay an annual registration fee of $15.00. Users of pesticides who store, mix or otherwise handle pesticides within the village must provide the village fire department with a copy of their registration forms.

The ordinance requires users who apply pesticides to commercial businesses or public buildings to supply the building operators with decals that indicate the date the pesticides were applied. The decals must be posted at the building entrances until the time of the next application or ninety days, whichever occurs first.

Village residents whose physicians declare them to be "sensitive" to pesticides may, for an annual fee of $15.00, be placed upon the village's list of chemically sensitive residents. The village updates the list monthly. The ordinance requires all commercial users of pesticides to obtain current copies of the list and to notify the chemically sensitive residents at least twenty-four hours in advance of an outdoor application. The ordinance permits written notice where oral notice is not possible. In addition, users of pesticides must also place yard markers containing the words "Chemically Treated Lawn - Keep Children and Pets Off for 72 Hours" on the property where an outdoor application has been made. The ordinance provides that violations of its terms shall be penalized by assessments of fines ranging from $25 to $100, depending upon the number and type of violations.

The association initiated this action by filing a complaint seeking declaratory and injunctive relief on May 5, 1989. The association alleged that FIFRA preempts the local regulation of pesticides, such as Ordinance No. 197. The village answered the complaint on June 5, 1989, and soon thereafter the parties filed cross-motions for summary judgment.

On August 24, 1989, in a ruling from the bench, the district court granted the association's motion for summary judg-

ment and enjoined the village from enforcing Ordinance No. 197. The district court filed an order memorializing its decision on September 15, 1989.

B.

FIFRA was originally enacted in 1947 as a pesticide labeling statute. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). In 1972, in response to concerns about the safety of pesticide use, and "because of a growing perception that the existing legislation was not equal to the task of safeguarding the public interest," *id.* at 991-92, Congress rewrote FIFRA through amendments that transformed it into a comprehensive regulatory statute. *See id.* As amended, FIFRA "establishe[d] an elaborate framework for the regulation of pesticide use in the United States." *Love v. Thomas*, 858 F.2d 1347, 1350 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1932 (1989); *see also Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1296 (8th Cir. 1989).

FIFRA contemplates various levels of interaction between the federal, state and local governments in the regulation of pesticides and their use. FIFRA defines a "state" as "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa." 7 U.S.C. § 136(aa). FIFRA does not define "political subdivisions" or "local authorities." Some sections of FIFRA, however, refer explicitly to "political subdivisions" and "local agencies" as distinct from "states." *See* 7 U.S.C. §§ 136f(b); 136r(b); 136t(b).

FIFRA expressly permits states to regulate the use of federally registered pesticides, "but only if and to the extent the regulation does not permit any sale or use prohibited by" the federal statute. 7 U.S.C. § 136v[1]. FIFRA does not contain

[1]§ 136v Authority of States

any provisions that authorize or prohibit political subdivisions or local authorities from regulating pesticides or their use.

Pursuant to the grant in section 136v, the State of Michigan enacted the Pesticide Control Act of 1976. Mich. Comp. Laws Ann. §§ 286.551 - .581. The state largely adopted the federal standards, including FIFRA's certification standards for commercial applicators of pesticides. As a result, commercial pesticide applicators are subject to extensive federal and state regulation in Michigan.

In making its decision, the district court turned first to FIFRA's legislative history, which reveals that the pesticide legislation President Nixon proposed in 1971 included provisions that expressly gave local governments the power to regulate pesticides and their use. However, nearly every congressional committee that passed on the proposed legislation deleted those provisions in the belief that the state and the federal governments could regulate pesticides adequately without subjecting the pesticide industry to thousands of regulatory jurisdictions. *See Maryland Pest Control Ass'n v. Montgomery County, Maryland,* 646 F. Supp. 109, 111-13 (D. Md. 1986), *aff'd without published opinion,* 822 F.2d 55 (4th Cir. 1987), *further related proceedings,* 884 F.2d 160 (4th

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(a) In general

A state may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

Cir. 1989) (per curiam) ("*Maryland Pest Control*"). As a result, the legislation that Congress enacted contained no provisions granting local governments the power to regulate pesticides and their use. The district court concluded that when Congress amended FIFRA in 1972, it occupied the entire field of the regulation of pesticides "and then it specifically gave states [and not their political subdivisions] the right to operate within the field . . . ." J.A. 33.

The district court also noted that the question of the preemption of local regulations of pesticides and their use had been decided in two reported opinions, with each court reaching different results. The United States District Court for the District of Maryland found a county ordinance nearly identical to the village's to be preempted in *Maryland Pest Control*, while the California Supreme Court found a voter-enacted ban on the aerial application of certain pesticides not to be preempted. *See People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984) ("*Mendocino County*").[2] The district court adopted the analysis in *Maryland Pest Control* and concluded that FIFRA preempted Ordinance No. 197.

II.

A.

In determining whether Congress has exercised its power to preempt state or local regulations, we give primary emphasis to ascertaining the congressional intent underlying the statute in question. *See R. J. Reynolds Tobacco Co. v. Durham County, North Carolina*, 479 U.S. 130, 140 (1986). Congress

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[2]The Wisconsin Supreme Court recently followed *Maryland Pest Control*, *see Mortier v. Town of Casey*, 154 Wis.2d 18, 452 N.W.2d 555 (1990), while the Supreme Judicial Court of Maine recently followed *Mendocino County*, *see Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990).

may preempt a state or local law expressly or by passing a statute that is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary . . . regulation." *Hillsborough County, Florida v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Where the federal statute is not so large that it occupies the entire field, state and local law may still be preempted where it conflicts with the federal law by standing as an obstacle to Congress' purposes, *see Schneidewind v. ANR Pipeline Co.*, 489 U.S. 293, __, 108 S. Ct. 1145, 1151 (1989), or where " 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state [or local] laws on the same subject.' " *Hillsborough County*, 471 U.S. at 713 (quoting *Rice*, 331 U.S. at 230).

Absent express language to the contrary, there is ordinarily a presumption against preemption, *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), especially when the challenged state or local regulation concerns state or local health and safety matters. *See Hillsborough County*, 471 U.S. at 715. However, the failure of a federal statute to speak directly to preemption does not necessarily create a gap for state or local regulation. *See Adams Fruit Co. v. Barrett*, 110 S. Ct. 1384, 1390-91 (1990).

B.

The village claims that the district court's analysis was off-target because Ordinance No. 197 does not regulate pesticides or their use, but is merely a "public notice regulation" designed to protect the health and safety of village residents. We cannot agree because the unambiguous language of the ordinance imposes requirements that pesticide users must fulfill, and practices they must follow, before and after applying pesticides. By its plain terms, the ordinance regulates "users of pesticides," the application of pesticides, and con-

duct that concerns the application and use of pesticides.[3] Therefore, we conclude that Ordinance No. 197 is an attempt by a local government to regulate pesticides and their use. *See Maryland Pest Control*, 646 F. Supp. at 113; *see also New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 117 (2d Cir. 1989) (*state* public notice requirement held to be a permissible sale and use regulation).

C.

FIFRA does not preempt the village ordinance by its express terms, which leaves resolution of this issue to a determination of whether Congress has preempted local regulation by implication. We are urged by the parties to join with the Wisconsin Supreme Court in adopting the rationale of *Maryland Pest Control, see Mortier v. Town of Casey*, 154 Wis.2d 18, 452 N.W.2d 555 (1990), or to adopt the opposing view and join the Supreme Judicial Court of Maine in following *Mendocino County, see Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990).

In *Mendocino County*, the California Supreme Court found that because FIFRA contemplates various levels of state and local interaction, Congress did not occupy the entire field, but merely joined the state and local governments in pesticide regulation. The court emphasized FIFRA's failure to limit

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[3]Determination of the meaning of a statute begins with the plain language of the statute itself. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, ___, 109 S. Ct. 1026, 1030 (1989); *Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988). Because "use" and "apply" are not defined by the ordinance, we interpret them "as taking their ordinary, contemporary, common meaning[s]." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Definitions of "apply" include "to put to use especially for some practical purpose" and "to .... lay or spread on," *Webster's Third New International Dictionary* 105 (1981), while definitions of the noun "use" include "a method or manner of using something" and "the privilege or benefit of using something." *Id.* at 2523.

the states' ability to delegate their authority to political subdivisions and the traditional regulatory powers of state and local governments.[4] The court concluded that as political subdivisions of states, local governments could regulate pesticide use. The court also reviewed FIFRA's legislative history and failed to find any express indications that Congress intended to deny local governments the power to regulate pesticide use.

In *Maryland Pest Control,* the district court concluded that through the 1972 amendments to FIFRA, Congress intended to enact, and did enact, a comprehensive statute that occupied the field of pesticide regulation. 646 F. Supp. at 110. The court found that by its terms, FIFRA opened specific portions of the field to state regulation and much smaller portions to local regulation. *Id.* at 111. The district court concluded that if it were to ignore the distinctions Congress drew between states and their political subdivisions, it would needlessly render vast portions of the statute superfluous and ignore Congress' intent to erect a broad federal regulatory framework. *Id.* The district court also found that legislative history demonstrated that both houses of Congress specifically considered, and specifically rejected, President Nixon's proposed provisions that would have allowed for local regulation of pesticides and their use. *Id.* at 111-113.

Our analysis of FIFRA and its legislative history leads us to conclude that when Congress rewrote the statute, it impliedly preempted the local regulation of pesticides, including Ordinance No. 197. It is well-established that the starting point in preemption analysis is congressional intent, and it is undisputed that the intent behind the 1972 amend-

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[4]Notably, a year after *Mendocino County* was decided, the United States Supreme Court held that Congress could control the states and regulate in areas that were previously thought to be insulated from a federal regulation because they were "traditional" areas of state and local control. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985).

ments was to enact sweeping federal pesticide regulation. Congress transformed FIFRA into a statute that cast a regulatory net over pesticides and their use, in part by giving the EPA enforcement authority over the use, sale and labeling of pesticides. When seen in this context, the *Mendocino County* view that Congress only entered the field of pesticide regulation already occupied by state and local governments is, at best, strikingly inconsistent with the undisputed legislative intent.

Moreover, *Mendocino County* ignores the distinctions Congress drew in the express terms of the legislation. FIFRA contains several provisions that expressly refer to political subdivisions and local authorities as distinct from state governments and agencies. Additionally, Congress did not include political subdivisions in its definition of "states." *See* 7 U.S.C. § 136(aa). Where, as here, " 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion.' " *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *see also Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1197 (6th Cir. 1983). ("It is a fundamental rule of statutory construction that inclusion in one part of a congressional scheme of that which is excluded in another part reflects a congressional intent that the exclusion was not inadvertent.").

State law is preempted where it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind*, 485 U.S. at _, 108 S. Ct. at 1151. As the district court pointed out, adoption of the *Mendocino County* view would allow the uniformity and comprehensiveness Congress sought to establish through FIFRA to be lost in the muddle of thousands of local standards and regulations. FIFRA would no longer stand as a sweeping federal

regulatory framework but would become the lowest common denominator in an equation of infinite variables.

Courts need only to examine the legislative history of a statute when its terms are ambiguous or where enforcement of the plain terms of the statute would "produce a result demonstrably at odds with the intention of [the statute's] drafters." *Ron Pair Enterprises,* 109 S. Ct. at 1031 (quoting *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571 (1982)). In this case, the district court reviewed the legislative history of the 1972 amendments and adopted the analysis in *Maryland Pest Control.* We, too, agree with the *Maryland Pest Control* analysis, and also with Judge Kaus, who dissented from *Mendocino County* in part because he found the decision was "based on an untenable reading of the legislative record." *Mendocino County,* 683 P.2d at _ (Kaus, J., dissenting). The lengthy history of the 1972 amendments to FIFRA demonstrates that both houses of Congress positively rejected President Nixon's proposal that local governments be permitted to regulate pesticides and their use. In addition, as noted in *Maryland Pest Control,* several of the committee reports explicitly stated an intent to deprive local authorities of the power to regulate pesticide use. *See Maryland Pest Control,* 646 F. Supp. at 112-13.

III.

In the absence of explicit statutory language, there is a presumption against the preemption of local police powers. *See Maryland v. Louisiana,* 451 U.S. 725, 746 (1981). However, that presumption does not stand unrebutted merely because Congress failed to include a provision that expressly preempted state law. *See Adams Fruit Company v. Barrett,* 110 S. Ct. 1384, 1390-91 (1990). In this case, the presumption against preemption is overcome because FIFRA, as amended in 1972 and thereafter, is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary . . . regulation." *Hillsborough County,* 471

U.S. at 713. Moreover, the statutory language and the fundamental rules of statutory interpretation make it clear that Congress intentionally omitted states' political subdivisions from the section 136v grant of authority to regulate pesticides, and the legislative history demonstrates that Congress positively rejected the proposal to make room for local governments in the field of pesticide regulation.

Accordingly, for the foregoing reasons, the judgment of the district court is AFFIRMED.

DAVID A. NELSON, Circuit Judge, concurring. The starting point in any analysis of the preemptive effect of an Act of Congress, it seems to me, must be the language of the act itself. The language of the act that is before us in this case manifests a clear intent *not* to preempt all state regulation of the use of pesticides. State regulation is often effected through locally adopted ordinances, of course, and insofar as the type of pesticide regulation at issue here is concerned, the statutory language does not necessarily indicate that Congress intended to rule out ordinances adopted by state political subdivisions pursuant to authority conferred by state statute or state constitutional provision.

The legislative history, on the other hand, suggests about as strongly as it possibly could that Congress did indeed intend to keep the field of pesticide regulation clear of local ordinances. I would have felt more comfortable about carrying out this intent if Congress had done a better job of writing it into the law. I conclude, however, as the other members of the panel have done, that the Village of Milford's ordinance cannot be permitted to stand. I write separately because my reasoning differs somewhat from that of my colleagues and because this case presents an important question the proper resolution of which is by no means free of doubt.

I

The Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 89 Stat. 973, amended the Federal Insecticide, Fungicide and Rodenticide Act (now codified at 7 U.S.C. §§ 136 *et seq.*) to create a comprehensive system for regulating both interstate and intrastate distribution and use of pesticides. The 1972 legislation was not intended to occupy the field totally; in its present form, § 24(a) of the Act expressly declares that "[a] State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act. . . ." 7 U.S.C. § 136v(a).

For purposes of the Act, the term "State" is defined as meaning what it says — "a State" — plus the District of Columbia and Puerto Rico, along with the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa. Section 2(aa) of the Act, 7 U.S.C. § 136(aa).[1] The statutory definition does not, on its face, exclude a state's political subdivisions.

In declaring that "[a] State may regulate the sale or use of any federally registered pesticide," similarly, § 24 of the Act says nothing about the agency or agencies through which the power of the state may be exercised. There is a sharp contrast, in this respect, between § 24 and § 4(a)(2), a section dealing with certification of competency in pesticide use and handling. The latter section, as currently codified at 7 U.S.C. § 136i(a)(2), provides in part as follows:

> "If any State, at any time, desires to certify applicators of pesticides, the *Governor* of such State shall submit a State plan for such purpose. The Administrator shall approve the plan submitted by any State, or any modification thereof, if such plan in his judgment —
>
> > (a) designates *a State agency* as the agency responsible for administering the plan *throughout the State* . . . ." (Emphasis supplied.)

The Act imposes no corresponding requirements with respect

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[1]In a letter sent to the Chairman of the Senate Commerce Committee before enactment of the legislation, the General Counsel of the Treasury Department, Mr. Samuel Pierce, pointed out that this definition "would extend the coverage of the Act to a geographical area greater than that comprising the Customs territory of the United States . . . ." S.Rep. No. 516, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4092, 4129. Mr. Pierce recommended a definition confined to the several states, the District of Columbia, and Puerto Rico, but his recommendation was not adopted.

to the type of regulations at issue in this case, which involve registration and notice but do not involve competency certification. Absent any such requirements, it would not be unreasonable to suppose that states are free to exercise their power outside the area of competency certification through whatever mechanism might seem most expedient to them.

Municipal bodies are "essentially creatures of the state." *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500, 507 (6th Cir. 1986) (Engel, J., concurring). They are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them." *Kelley v. Board of Educ. of Nashville & Davidson County*, 836 F.2d 986, 994 (6th Cir. 1987) (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907)), *cert. denied*, 487 U.S. 1206 (1988). If the State of Michigan has retained the power to impose registration and notice requirements on commercial users of pesticides, therefore, one would normally assume that the state could authorize the exercise of that power through whatever political subdivision it wished.

It is undisputed that under the "home rule" provisions of the Michigan constitution, the Village of Milford has sweeping power to adopt ordinances relating to public health and other matters of municipal concern. See Mich. Const., Art. VII, § 22. When the predecessor of Michigan's current constitution was adopted in 1908, "very broad, general powers of government were consigned to those units of government likely to be best informed of local needs and best able to satisfy them . . . ." *Dooley v. City of Detroit*, 370 Mich. 194, 121 N.W.2d 724, 730 (1963). That allocation of powers was continued when Michigan's current constitution was adopted in 1963 — and villages were among the units of government to which very broad powers were assigned. Incorporated villages, the Michigan legislature has confirmed, possess the authority to pass such ordinances as they may deem proper to "preserve the public health," among other things, and to

"make such other regulations for the safety and good government of the village and the general welfare of its inhabitants as are not inconsistent with the general laws . . . ." Mich. Comp. Laws § 67.1. See also Michigan's "Village Home Rule Act," Mich. Comp. Laws §§ 78.1 *et seq.*

Because the State of Michigan has thus clearly authorized ordinances such as that enacted by the Village of Milford, there is a very real sense in which the Milford ordinance represents "state" action within the territorial limits of the village. The results of this state action are no different in kind from those that would have been produced had Michigan chosen to regulate pesticide usage in the village through a statute passed directly by the legislature and signed by the governor. It is true that municipalities are not specifically mentioned in the definition section of the Pesticide Control Act, but state governors and state legislatures are not specifically mentioned in that section either.

There are three sections of the Pesticide Control Act in which Congress did refer specifically to political subdivisions or local agencies. It has been argued, therefore, that "when Congress intended that local governments play a role in [the Act's] regulatory scheme, it specifically said so." *Maryland Pest Control Ass'n v. Montgomery County*, 646 F.Supp. 109, 111 (D.Md. 1986) (quoting 70 Ops. Atty. Gen. Md. 161 (1985)), *aff'd*, 822 F.2d 55 (4th Cir. 1987) (unpublished op.). The argument, it seems to me, is not persuasive.

The first section of the Act to refer specifically to political subdivisions is § 8 (7 U.S.C. § 136f), which deals with the maintenance and inspection of books and records. Section 8(a) authorizes the Administrator of the Environmental Protection Agency to require pesticide manufacturers to maintain records of their operations, and § 8(b) says that manufacturers shall produce such records for inspection "upon request of any officer or employee of the Environmental Protection Agency *or of any State or political subdivision, duly*

designated by the Administrator . . . ." 7 U.S.C. § 136f(b) (emphasis supplied). The authority of the EPA Administrator to designate such officials is conferred by § 23(a) of the Act, which authorizes the Administrator to enter into cooperative agreements with "States" to "delegate to any *State* the authority to cooperate in the enforcement of the Act through the use of *its* personnel . . . ." 7 U.S.C. § 136u(a) (emphasis supplied).[2] Section 23 of the Act necessarily uses the word "State" to include political subdivisions, for it would not otherwise be appropriate to speak of political subdivisions in § 8. And if "State" includes political subdivisions in § 23 of the Act, it can hardly be a forgone conclusion that "State" does not include political subdivisions in § 24 of the Act as well.

The next section of the Act to refer specifically to political subdivisions is § 20 (7 U.S.C. § 136r), which mandates cooperation with local agencies in connection with research and monitoring. Section 20(b) directs the Administrator to formulate a national plan, "in connection with other Federal, State or local agencies," for monitoring pesticides. Section 20(c) directs the Administrator to undertake monitoring activities, again in cooperation with other federal, state or local agencies.

Section 22(b), finally, contains a more generalized directive for the Administrator to cooperate with local agencies, *inter al.*:

> "The Administrator shall cooperate with the Department of Agriculture, any other Federal agency, and any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this Act, and in securing uniformity of regulations." 7 U.S.C. § 136t(b).

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[2]This section was amended in 1978 to include Indian tribes as well as states. Pub. L. No. 95-396, § 21, 92 Stat. 834 (1978).

These statutory directives for the Administrator to cooperate with appropriate local officials and political subdivisions shed little or no light on the question whether pesticides may be regulated by local ordinance. A mandate for the Administrator to cooperate with political subdivisions is certainly no less consistent with the conclusion that states may confer a regulatory role on their political subdivisions than it is with the conclusion that they may not.

II

If the Act itself does not plainly show that Congress intended to preclude states from regulating through their political subdivisions, the amendments, committee reports and floor debates comprising the legislative history of the enactment demonstrate almost conclusively, I believe, that those who were most knowledgeable about this piece of legislation, and who had the greatest responsibility for shaping its terms, understood that it was designated to do precisely that. Most Members of Congress, to be sure, probably never focused on the issue at all. The Members on whom the rank and file were relying to hammer out an acceptable bill did focus on the issue, however, and evidently made a conscious decision that regulation by political subdivisions should be preempted. That decision was not solely the work of anonymous staffers, and it was not slipped into the legislative history at the last minute — or, as sometimes happens, after the last minute. The decision was made well in advance of enactment of the legislation, it was known to and accepted by the members of the responsible committees, and it was openly explained prior to enactment.

President Nixon's original proposal for the legislation that became the 1972 Pesticide Control Act said explicitly that "nothing in this Act shall be construed as limiting the authority of a State *or a political subdivision thereof* to regulate the sale or use of a pesticide within its jurisdiction insofar as such regulation does not permit such sale or use as is prohibited

under authority of the Act." H.R. 4152, 92d Cong., 1st Sess. § 19(c)c (1971), as quoted in *Maryland Pest Control Ass'n*, 646 F.Supp. at 111-112. (Emphasis supplied.) The House Agriculture Committee, which was the first committee to report the legislation out, not only deleted this reference to political subdivisions,[3] but would also have prohibited the states themselves from restricting the use of any pesticide that the Administrator of the EPA had registered with a "general use" classification:

> "A State may regulate the sale or use of any pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act *or restrict by license or permit the use of a pesticide registered for general use.*" § 24(a) of H.R. 10729, 92d Cong., 1st Sess., 117 Cong. Rec. 40,027 (1971). (Emphasis supplied.)

In the ensuing debate on the House floor, Congressman Dow offered a substitute bill containing six amendments, the last of which dealt with § 24(a). Congressman Dow did not propose to restore the language authorizing regulation by political subdivisions; he simply proposed striking the prohibition against states going further than the federal government in restricting pesticides registered for general use. 117 Cong. Rec. 40,034 (1971). Mr. Dow noted that state officials from ten states, including Michigan, had expressed "opposition to the preemption of State authority authorized by section 24." *Id.* at 40,035. No such opposition was noted with regard to the change the Agriculture Committee had made concerning political subdivisions.

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[3]The accompanying report explained that "The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971).

The Dow substitute was ultimately defeated, but on motion of Congressman Kyl, and with the support of Chairman Poage of the Agriculture Committee, § 24(a) was amended on the House floor to drop the restriction to which Congressman Dow and others had objected. *Id.* at 40,065. The amended version of that bill — which reflected a number of changes made in committee, as well as the one change made on the House floor — was hailed as "the compromise product of environmentalists, farm groups, State and Federal officials, the chemical industry, and the public." *Id.*, remarks of Congressman Sebelius.

On the Senate side the legislation was considered first by the Committee of Agriculture and Forestry and then by the Commerce Committee. 118 Cong. Rec. 32,251 (1972). Under date of June 7, 1972, the former committee issued a report containing this highly instructive passage:

> "*The Senate Committee considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives.* Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting such regulation would be an extreme burden on interstate commerce, *it is the intent that section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.*"

S.Rep.No. 838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993, 4008. (Emphasis supplied.)

The Senate Commerce Committee disagreed with the Agriculture Committee on this and a number of other issues. The Commerce Committee adopted 15 sets of amendments to the Agriculture Committee's version of the bill, one of which (Amendment No. 10) was explained thus in a report issued by the Commerce Committee under date of July 19, 1972:

> "*Authority of Local Governments to Regulate the Use of Pesticides*
>
> The amendment gives local governments the authority to regulate the sale or use of a pesticide beyond the requirements imposed by State and Federal authorities.
>
> While the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators. The amendment of the Committee on Commerce is intended to continue the authority of such local governments and allow then to protect their environment to a greater degree than would EPA.
>
> The amended language would prohibit local governments from imposing requirements as to labeling and packaging which differ from those imposed by Federal and State authorities. Localities would therefore be preempted from regulating the composition of any pesticide. Local governments could, however, prohibit or restrict the sale or use of pesti-

> cides within their jurisdiction. As manufacturers will not be forced to formulate different variations of the same pesticide to meet local needs, no unreasonable burdens on commerce are anticipated. Nor are burdens on the environment, since localities could not permit sales or uses prohibited by State and Federal authorities." S.Rep.No. 970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4092, 4111-12.

After issuance of this report, the two committees and their staffs engaged in extensive negotiations and ultimately worked out a compromise bill. 118 Cong. Rec. 32,251 (1972). The compromise — which was supported by all of the members of the Agriculture Committee and a majority of the members of the Commerce Committee, including Senator Hart of Michigan, *id.* at 32,252 — incorporated nine of the Commerce Committee changes, with modifications, but did not include Amendment No. 10. An explanation of the compromise printed in the Congressional Record for September 26, 1972, described the amendments that had been adopted and noted that "Commerce Committee amendments . . . 10 (authority of local governemnts to regulate the use of pesticides) . . . are not included in the substitute." *Id.* at 32,258.

Senator Hart inserted a statement in the record supporting the compromise. *Id.* at 32,258. Several of Senator Hart's colleagues took note of the long hours he personally had spent on the legislation. *Id.* at 32,259-60.

Senator Allen, the Agriculture subcommittee chairman responsible for the management of the bill on the floor, expressed himself on the compromise as follows:

> "The package of amendments now before us reflect a reasonable compromise agreement between the Agriculture Committee and the Commerce Committee. Each participant in this agreement may have some reservations about particular provisions

> that have been added or about particular provisions that have been deleted.
>
> No one should have any doubt, however, that this agreement marks a major and significant improvement over present authority to control pesticides. No one should have any doubts about the concern for environmental quality which is expressed in this bill with the addition of the Agriculture/Commerce package of amendments." *Id.* at 32,260.

The Senate passed the compromise by a vote of 71 to 0. *Id.* at 32,263. Section 24 was exactly the same in both the Senate and House bills, and no changes were made in that section when the bills went to the conference committee. The conference report was passed by both houses without further discussion of the regulatory authority of local governments. The view of the House and Senate Agriculture Committees on that issue prevailed, and the view of the administration and the Senate Commerce Committee did not.

The appellants in this case argue that because the dispute over preemption of local regulatory authority was compromised by not specifically referring to this subject in the statute, the compromise was not designed to preempt traditional local police powers or to preempt the power of a state to distribute its regulatory authority between itself and its political subdivisions in any way it might see fit. (See *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal.3d 476, 683 P.2d 1150, 1160-61 (1984), for a succinct statement of this position.) The argument might have been persuasive if the compromise had been limited to the local government issue, but such was not the case. There were numerous points of disagreement between the Senate committees, for example, and the compromise reached in the Senate was based on the Agriculture Committee's receding on some issues and the Commerce Committee's receding on others. The local government question was one on which the Commerce Committee gave

way to the Agriculture Committee entirely, and when the Senate passed the compromise bill, it passed a bill that the Commerce Committee had said, in its June 7 report, "should be understood as depriving ... local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides."

When the House passed its version of the legislation, similarly, it adopted a compromise in which language preserving local regulatory authority had been deleted, as had language curtailing the regulatory authority of the states *qua* states with respect to general use pesticides. The House Agriculture Committee's announced intention in deleting the local government language was to limit the number of "regulatory jurisdictions" to "the 50 States [plus Puerto Rico, etc.] and the Federal Government." It was the House Committee's version that the Senate ultimately adopted, and the report of the Senate Agriculture Committee specifically endorsed "the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides ...." As Judge Motz observed in *Maryland Pest Control*, 646 F.Supp. at 111, "the legislative history could not be more clear."

III

But no matter how clear the legislative history may be, legislative history, as such, is not statutory law. "While we have frequently said that pre-emption analysis requires ascertaining congressional intent," the Supreme Court has noted, "... we have never meant that to signify Congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text." *Puerto Rico Dept. of Consumers Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988). "[L]egislative intention, without more, is not legislation." *Train v. City of New York*, 420 U.S. 35, 45 (1975).

The Constitution itself shows that committee reports and other such indicia of Congressional intent must not be

allowed to supplant the text of the statute. To become law, after all, a bill must have passed the House of Representatives as a whole, and not merely one or more House committees. U.S. Const., Art. I, § 7. It must have passed the Senate as a whole, and not merely one or more Senate committees. And "before it becomes a Law," a bill which has passed both the House and the Senate "shall be presented to the President of the United States." *Id.* The President may then veto the bill, in which case, unless each House overrides the veto by two-thirds vote, the bill "shall not be a Law." *Id.* Be it ever so clear, therefore, a committee report that has not passed both the House and the Senate and that has not been presented to the President cannot possibly be a "Law" within the meaning of the Constitution.

Still, the Supreme Court has long acknowledged that "[r]eports to Congress accompanying the introduction of proposed law may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation." *Caminetti v. United States*, 242 U.S. 470, 490 (1917). We are bound by the text of the statute, and where the proper interpretation of the enacted statutory text is "doubtful," resort to *bona fide* legislative history is always permissible and may sometimes be helpful.

What of the statute before us here; is its interpretation really doubtful? Doubtful enough, in my view.

The district court evidently believed that the system of pesticide regulation adopted in the Pesticide Control Act was so comprehensive that courts would have treated the entire field as having been occupied by the federal government absent the express disclaimer contained in § 24 of the Act. I am inclined to agree. Unless the affirmative grant of permission for "a State" to regulate pesticide use is properly interpreted as extending in one way or another to political subdivisions, then, political subdivisions may not enter the field — and although the term "State" ordinarily includes political subdivisions, there are times when it does not.

One need look no further than the Eleventh and Fourteenth Amendments to the Constitution to find radically different usages of the term. As used in the Fourteenth Amendment, a "State" includes political subdivisions. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 173 (1970). As used in the Eleventh Amendment, a "State" does not include political subdivisions. *Mt. Healthy City Board of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). In which sense was the term used in §§ 24 and 2(aa) of the Pesticide Control Act? I cannot say the issue is not "doubtful," even though the legislative history points to an answer that I would not have given had there been no such history. Although I consider this a close case, therefore, I agree that the district court reached the correct result.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PROFESSIONAL LAWN CARE
ASSOCIATION OF AMERICA,

Plaintiff, No. 89-1439

-v-

VILLAGE OF MILFORD, MICHIGAN.

Defendant.

Proceedings had before the Honorable Horace W. Gilmore, United States District Judge, at Detroit, Michigan, on Thursday, August 24, 1989.

APPEARANCES:

KENNETH A. FLASKA
JOSEPH D. LONARDO
Appearing on behalf of Plaintiff

PATTI A. GOLDMAN
PAUL V. GROTH
Appearing on behalf of Defendant

THE COURT: I think this is a very interesting question and I would like to spend a lot more time working on it because

I think it is very close. However, I think it is more important that we have a decision because I am sure whichever way I decide, one side or the other is going to take it to the Court of Appeals. And, as I say, I think it is a very close question but I think I am prepared to rule and I will rule now.

The question arises about preemption provisions of the Federal Insecticide, Fungicide and Rodenticide Act or FIFRA. There are no disputed facts and we are here on cross motions for summary judgment.

In 1986 the Village of Milford enacted an ordinance that regulated the use and application of pesticides in the following way. It required that any company that was coming in to use pesticides in Milford had to pay a $15.00 fee, it had to register with the City of Milford, and it had to post a notice after the pesticide was sprayed to stay up for 72 hours saying in effect the pesticide has been put on and children and animals should keep off. That may be a little general but that is basically what the ordinance says. It says in effect, "Any person who applies or causes pesticides to be applied shall pay the $15 annual fee, shall file a statement with their name, address, telephone number, and the generic names of any pesticides to be used. They also must provide and place a yard marker containing the words 'chemically treated lawn -- and keep children and pets off for 72 hours.'" And the ordinance further prohibits property owners from removing the sign during the 72 hours.

Now it is the contention of the Plaintiff, Professional Lawn Care Association of America, that FIFRA has totally occupied this field and that these regulations of the Village of Milford are regulations of the use of pesticides, and because the federal government and FIFRA has totally occupied the field, given authorization to states to control but has specifically denied authorization to local areas, that an injunction

should issue enjoining the implementation of the ordinance. It is the position of the Village of Milford, and I am summarizing these very briefly, that FIFRA has entered this field and given the state authority to regulate pesticides, to regulate labeling and the like, but that this ordinance, which basically requires a $15 annual fee, a posting and the filing of the name, address and telephone number and the like of the pesticide company, does not -- is not an area that was intended to be preempted by FIFRA, that this is an area of supplemental regulation, that it is not preempted and that there is not an intention for clear, complete regulation.

Now FIFRA, specifically 17 U.S.C. 136 and following, provides that the federal government and the states will participate in a pesticide regulatory effort, and the specific language of the statute in Section 136v(a) is that, "A State may regulate the sale or use of any federally registered pesticide or device in the State," and then they proceed to define state as a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa. They stop there with those very specific definitions. Therefore, Plaintiff's position is that Congress' intent was to preclude the exercise of any regulatory, any kind of regulatory authority by local political subdivisions such as Milford because that term was not included within the definition of state contained in the statute.

Now I think, first of all, that it is important to look at the legislative history because that is always helpful in determining what a statute means.

Basically the report of the Senate Agricultural Committee was that, "It is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities

of or in the States, should be understood as depriving local authorities and political subdivisions of any and all jurisdiction over pesticides and the regulation of pesticides." That is the Senate Agricultural Committee's report, reprinted in 1972 U.S. Code, Congressional and Administrative News, 3993 at 4008. Whereas the Commerce Committee Report, and this matter was a matter that was before both the Agriculture and Commerce Committees, the report of the Senate said, "The amendment of the Committee on Commerce is intended to continue the authority of such local governments and allow them to protect their environment to a greater degree than would EPA." 1972 Code, Congressional and Administrative News, 4092 at 4111.

The matter then went to a conference committee and a compromise substitute bill came out which did not contain any provision authorizing local regulations. In other words, the bill that came out was the one that had been presented by the Agriculture Committee not the Commerce Committee. When the full Senate considered the bill after conference, of course the conference report was offered, and the statement was inserted into the Congressional Record stating that the amendments "should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." Senator Allen on the floor made clear that the compromise did not include the Commerce Committee's amendment granting local governments authority to regulate pesticides.

Eventually the Conference Committee, leaving out the Senate Commerce Committee's amendment, was adopted, and both versions merely gave authority to the federal government and the states to regulate pesticides. As a matter of fact, there was no mention in the joint explanatory statement of the

Conference Committee and the statute was eventually passed.

Subsequently, regulations were promulgated of the EPA and in 171.7(a) at 40 Federal Register 11700, it was specifically held, "It is not the intention of the Act or these regulations to authorize political subdivisions below the state level to further regulate pesticides."

There are only two cases on this. One is the People ex rel Deukmejian v. County of Mendocino, 36 Cal3d 476, where the Court held that the term state should not be construed "to exclude agents of the enumerated party" such as local governments which are political subdivisions of the states. The other case is Maryland Pest Control v. Montgomery, 646 F. Supp 109, from the District of Maryland, which held that there was no authority for local units of government to make any regulations.

Now the Defendant City argues that there is no question but what the area of labeling and regulation of pesticides was preempted by the statute but they argue this is not a regulation controlling pesticides or their use or labeling, that this is a different type, a police registration and posting requirement and was not of the kind that was intended to be preempted and that the power was there before and that the local communities still have it.

As I say, I think the case is a fairly close case but we start out with the fundamental proposition that Congress certainly possesses the power under the supremacy clause to preempt local as well as state laws, and that the preemption of local laws can take place in one of the two ways. First, if Congress evidences an intent to occupy a given field, then any state law or local ordinance falling within that field is preempted. And, second, if the state law is in conflict with the federal statute,

that there will be preemption there.

Now in this case the Congress clearly intended, in my opinion, to preempt this entire field and then it specifically gave states the right to operate within the field, and the rationale is one that can be rather easily understood. States and the federal government have the expertise to hire scientists, to do research, and to obtain the kind of information that is necessary for the purpose of determining what pesticides, insecticides, and the like are safe in the environment and which ones are not whereas local units of government generally, particularly small cities like Milford or any of the other small cities around the country, just don't have the facilities to do the kinds of work and research that is necessary.

Further, the other point that I think is important in looking at the rationale, looking at the statute and what it means, is the fact that if you allowed local governments to set up regulations in this field, you could have 300 different regulations in the State of Michigan, you could have every City coming up with a different plan, some could require postings for a week, others could require maybe the building of fences, the others could require policing, I mean all kinds of ordinances. If you say that they have got a right to do posting and they have got the right to take other actions like that that don't go directly to labeling of the types of pesticides, you could have 300 different regulations and certainly that is not rational. I think the analysis in Maryland Pesticide Control v. Montgomery, 646 F. Supp. 109, is excellent. I think it's on point and I think it is exhaustive. I think I will adopt that and I will grant the injunction of the Plaintiff.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
* * *

PROFESSIONAL LAWN CARE
ASSOCIATION OF AMERICA,

Plaintiff,

vs. Case No. 89-CV-71439-DT
Hon. Horace W. Gilmore

VILLAGE OF MILFORD,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND INJUNCTIVE RELIEF AND DENYING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

At a session of said Court in the
Federal Courthouse, City of Detroit,
County of Wayne, State of Michigan on,

Sept. 15, 1989

PRESENT: HON: /s/ Horace W. Gilmore
U.S. District Court Judge

This matter having come before this Court upon Plaintiff's Motion for Summary Judgment and Injunctive Relief, and

Defendant's Cross Motion for Summary Judgment, and the Court having reviewed the Briefs filed by the parties in this matter and having heard oral argument from counsel for both parties;

NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment be and hereby is granted for the reasons set forth on the record in open Court on August 24, 1989 and for the reasons set forth in Maryland Pest Control Association v. Montgomery County, 646 F. Supp. 109 (D. MD. 1986), affirmed, 822 F.2d 55 (C.A. 4, 1987).

IT IS FURTHER ORDERED that the Defendant, Village of Milford, Michigan is hereby enjoined from enforcing Village of Milford Ordinance 197 on the grounds that said Ordinance is preempted by the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136 et seq.

IT IS FURTHER ORDERED that Defendant's Cross Motion for Summary Judgment is denied.

/s/ Horace W. Gilmore
U.S. District Court Judge

VILLAGE OF MILFORD ORDINANCE NO. 197

AN ORDINANCE TO PROVIDE FOR THE PUBLIC HEALTH AND SAFETY BY REQUIRING REGISTRATION OF PERSONS APPLYING PESTICIDES FOR HIRE WITHIN THE VILLAGE OF MILFORD AND PUBLIC NOTICE OF THE USE OF PESTICIDES; TO PROVIDE THE PUBLIC THE OPPORTUNITY OF AVOIDING CONTACT WITH THESE PESTICIDES: AND TO IDENTIFY THE LOCATION OF FLAMMABLE PESTICIDES.

THE VILLAGE OF MILFORD ORDAINS:

Section 1: For the purpose of this ordinance, the words and phrases defined in this section shall the meaning set forth herein.

(A) PESTICIDE means:

(1)Any substance or mixture of chemical substances intended for preventing, destroying, repelling or mitigating any pest; or

(2)Any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.

(B) USER OF PESTICIDES means:

(1)Any person who applies or causes pesticides to be applied to property by any means where such person is

engaged in applying pesticides for hire to trees, lawns, shrubs, plants, or the atmosphere; or

(2)Any person who applies or causes pesticides to be applied in commercial businesses and public buildings.

(C) OTHER DEFINITIONS

All other definitions set forth in the Michigan Pesticide Control Act, MCL 286.551 et seq., are hereby adopted.

Section 2: On and after the effective date of this ordinance, no user of pesticides engaged in the use or application of pesticides for hire shall apply pesticides within the Village of Milford, Michigan without first registering with the Village and receiving a receipt evidencing such registration.

Section 3:

(A)A user of pesticides engaged in applying pesticides for hire shall complete an application form and pay a fifteen ($15.00) Dollar annual registration fee to the Village of Milford. The application shall set forth the name of the user's business, address, telephone number and generic chemical name(s) of the pesticide(s) to be used. Proof of certification or licensure by the State of Michigan to apply the pesticide(s) to be used shall be furnished by such user of pesticides at the time of registration.

(B)A user of pesticides engaged in applying pesticides for hire, who stores, mixes or otherwise handles pesticides within the Village of Milford shall provide the Milford Fire Department with a copy of the completed application.

Section 4:

(A)Any user of pesticides who applies pesticides to commercial businesses or public buildings in the Village of Milford shall, upon completing each pesticide application, provide a decal to be displayed at the entrance of the premises showing the date of application. Such decal is to be supplied to the user of pesticides by the Village.

(B)Commercial businesses and public buildings in the Village of Milford shall display the decal supplied by the user of pesticides following the application of a pesticide and the decal shall remain posted until replaced at the time of the next application or 90 days being passed, whichever occurs first.

(C)Decals shall be in a muted color, display a symbol that will inform the public that pesticides have been applied on the premises, and make no reference to poison, pesticides, or other biocides. The decal shall have a space provided in which the date of

the application or the practice of continuous application is to be indicated.

(D)Failure to post the decal or removal of the decal before the time stated in Section 4(B) is a violation of this Ordinance.

Section 5:

(A)Residents of Milford who are medically certified as being chemically sensitive may place their name on a list to be given to users of pesticides who are registered with the Village under Section 3(A). All registered users of pesticides shall acquire such list from the Village office one month before commencing seasonal spraying program and shall acquire updated lists on a monthly basis thereafter. All registered users of pesticides shall give notice to each resident on the list who requested same prior to said application. Notice shall consist of an oral communication 24 hours in advance of an outdoor application to any listed resident. If an oral communication fails, the user of pesticides shall place a notice on the door of the home to be notified that such application will take place.

(B)Users of pesticides shall provide and place a yardmarker containing the words, "Chemically Treated Lawn - Keep Children and Pets Off for 72 Hours" on the property following an outdoor application,

insuch a manner so as to minimize unauthorized removal, but in an easily noticed location. The property owner shall not remove the yardmarker for a minimum of 72 hours following the application. Yard marker specifications are to be determined by the Village of Milford.

(C)Failure to post the yardmarker, as required in Section 5(B) is a violation of this ordinance.

(D)Any person who removes a yardmarker before it expires is in violation of this ordinance.

Section 6: Residents of the Village of Milford who desire to receive such advance notice of outdoor applications shall sign an application, provide a physician's certification of chemical sensitivity and pay a Fifteen ($15.00) Dollar annual fee to the Village of Milford.

Section 7: Whoever violates any of the provisions of this ordinance shall be assessed a Twenty Five ($25.00) Dollar fine for a first violation, a Fifty ($50.00) Dollar fine for a second violation and a One Hundred ($100.00) Dollar fine for each violation thereafter.

Section 8: This ordinance shall be in full force and effect from and after the earliest period allowed by law.

Section 9: Severability

If any section, paragraph, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitu-

tional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

Section 10: Repeal of Conflicting Ordinances

All ordinances or parts of ordinances in conflict herewith are hereby repealed only to the extent necessary to give this Ordinance full force and effect.

Section 11: Saving Clause

That nothing in this ordinance shall be construed to affect any suit or proceeding impending in any court, or any rights acquitted or liability incurred, or any cause or causes of action acquired or existing under any act or ordinances hereby repealed; nor shall any just or legal right or remedy of any character be lost, impaired or affected by this Ordinance.

Section 12: Adoption

This Ordinance is hereby declared to have been adopted by the Village Clerk of the Village of Milford at a regular meeting duly called and held on the 27th day of January, 1986, and ordered be given effect upon passage and publication as mandated by Charter and Statute.

Supreme Court, U.S.
FILED
OCT 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-382 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VILLAGE OF MILFORD,

Petitioner,

v.

PROFESSIONAL LAWN CARE ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH D. LONARDO
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6311

Attorneys for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED FOR REVIEW

Whether a local ordinance regulating the use of pesticides is preempted under the supremacy clause when the express language, legislative history, and administrative construction of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, indicate Congress' intent to preclude local regulation of pesticide use.

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OCTOBER TERM, 1990

No. 90-382

VILLAGE OF MILFORD,

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PROFESSIONAL LAWN CARE ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Nature Of The Case And Disposition Below

This case arises from the enactment of a local ordinance regulating the use of materials containing pesticides within the Village of Milford, Michigan. Respondent, the Professional Lawn Care Association of America ("PLCAA"),[1] filed its complaint on May

[1] The PLCAA is a national trade association which represents approximately 1,400 commercial lawn care companies.

5, 1989 in the United States District Court for the Eastern District of Michigan. The complaint alleged that Milford Ordinance No. 197, enacted by petitioner the Village of Milford, Michigan ("Milford"), violates the supremacy clause of the United States Constitution because FIFRA completely preempts the regulation of pesticides by local political subdivisions.

On August 24, 1989, following oral argument on cross-motions for summary judgment, District Judge Horace W. Gilmore ruled from the bench that the PLCAA's motion for summary judgment would be granted. App. 27a-32a. An order memorializing that decision was filed on September 15, 1989. App. 33a-34a.

On August 1, 1990, a panel of the United States Court of Appeals for the Sixth Circuit unanimously affirmed. App. 1a-26a. In an exhaustive opinion, the Court concluded that the clear meaning of the statute, on its face and based upon precedent defining its scope, precluded local regulation of pesticide use, and that the legislative history of FIFRA confirmed Congress' preemptive intent.

B. History And Operation of FIFRA

FIFRA was enacted on June 25, 1947. *See* Pub. L. No. 80-104, 61 Stat. 163 (1947). FIFRA was "intended to replace and expand the protection" afforded by the Insecticide Act of 1910, which was deemed "inadequate" because of the development of new pest control products and use of new chemical compounds. *See* H.R. Rep. No. 313, 80th Cong., 2d Sess., *reprinted in* 1947 U.S. Code Cong. Serv. 1200-01. Nevertheless, "[a]s first enacted, FIFRA was pri-

marily a licensing and labeling statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984).

In 1972, Congress enacted sweeping amendments to FIFRA, *see* Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (1972), which were designed to "completely revise[ ]" FIFRA. S. Rep. No. 838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993. This Court summarized the history and effect of the 1972 amendments as follows:

> Because of mounting public concern about the safety of pesticides and their effect on the environment and because of a growing perception that the existing legislation was not equal to the task of safeguarding the public interest, . . . Congress undertook a comprehensive revision of FIFRA through the adoption of the Federal Environmental Pesticide Control Act of 1972 . . . . The amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute . . . . As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority.

Ruckelshaus v. Monsanto Co., 467 U.S. at 991-92.

Before the 1972 amendments, states had exercised some regulatory authority over pesticides. The 1972 amendments, however, contained "a number of innovations to direct and strengthen federal control over

pesticides," *see Organized Migrants in Community Action, Inc. v. Brennan*, 520 F.2d 1161, 1165 (D.C. Cir. 1975), and thus totally altered the pre-existing regulatory structure. FIFRA now affords the federal Environmental Protection Agency ("EPA") broad regulatory and supervisory authority over the use and application of pesticides and analogous chemical substances. *See* 7 U.S.C. § 136 *et seq.* In furtherance of this authority, the EPA has promulgated extensive regulations, including regulations governing pesticide application. *See* 40 C.F.R. §§ 152-173 (1988).

In order to define and clarify the new allocation of regulatory power brought about by the 1972 amendments, FIFRA provides, in pertinent part:

> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

7 U.S.C. § 136v(a).

Pursuant to the authorization contained in FIFRA, the State of Michigan enacted the Pesticide Control Act of 1976, codified at Mich. Comp. Laws § 286.551 *et seq.* (1979). The Michigan Department of Agriculture subsequently promulgated regulations governing pesticide applicators, in conformity with the requirements of the Pesticide Control Act of 1976. *See* Mich. Admin. Code r. 285.636.1 *et seq.* (1979). Thus, pesticide applicators operating in Michigan are subject to extensive regulation at both the federal and state levels.

C. Milford Ordinance No. 197

On January 27, 1986, Milford enacted Ordinance No. 197, which seeks to regulate the application of pesticides within the Village of Milford. App. 35a-40a. Ordinance No. 197 governs certain activities of "users of pesticides," a phrase defined to mean, *inter alia*: "Any person who applies or causes pesticides to be applied to property by any means where such person is engaged in applying pesticides for hire to trees, lawns, shrubs, plants, or the atmosphere." Ordinance No. 197, § 1(B)(1), App. 35a-36a. The Ordinance requires that "users of pesticides" register with Milford, *id.* § 2, App. 36a, and pay a $15 annual registration fee, along with providing certain business information and the generic chemical names of the pesticides to be applied. *Id.* § 3(A), App. 36a. In addition, the Ordinance permits residents of Milford who are "medically certified as being chemically sensitive" to place their names upon a list to be distributed to registered "users of pesticides." *Id.* § 5(A), App. 38a. Registered "users of pesticides" are then required to give 24 hours advance notice of an outdoor application to any resident on the list. *Id.*, App. 38a.

Moreover, "users of pesticides" are required to provide and place a yard marker containing the words "Chemically Treated Lawn—Keep Children and Pets Off for 72 Hours" on the subject property following an outdoor application. *See* Ordinance No. 197, § 5(B), App. 38a-39a. The yard marker must be placed "in such a manner so as to minimize unauthorized removal, but in an easily noticed location" and must be kept on the subject property for a minimum of 72 hours following the application. *Id.*, App. 39a. The specifications of the yard markers are to be deter-

mined by Milford. *Id.*, App. 39a. The Ordinance finally provides that a violator of "any of the provisions of this ordinance" shall be assessed a $25 fine for a first violation, a $50 fine for a second violation, and a $100 fine for each violation thereafter. *See id.* § 7, App. 39a.

SUMMARY OF ARGUMENT

While this case presents a significant question, that question does not presently warrant review by this Court. The decision of the United States Court of Appeals for the Sixth Circuit in this case is consistent with the only other federal court of appeals decision addressing the question, as well as the statutory interpretation of the EPA and a recent decision of the Wisconsin Supreme Court. Although contrary decisions have been reached by two state courts and a federal district court, the emerging trend in the case law is that FIFRA preempts local regulation of pesticide use.

Moreover, the courts below applied established principles of preemption analysis and reached the correct result. The express language, legislative history, and administrative construction of FIFRA reveal clearly that Congress intended to preclude regulation of pesticide use by local political subdivisions such as Milford.

ARGUMENT

I. THE CONFLICT ALLEGED IN THE PETITION IS NEITHER SIGNIFICANT NOR RIPE FOR REVIEW BY THIS COURT

The decision of the Sixth Circuit in this case, *Professional Lawn Care Association v. Village of Mil-*

ford, App. 1a, 909 F.2d 929 (6th Cir. 1990), squarely holds that FIFRA preempts the regulation of pesticide use by local political subdivisions. This ruling is consistent with the only other federal court of appeals decision on the issue, *see Maryland Pest Control Association v. Montgomery County*, 646 F. Supp. 109 (D. Md. 1986), *aff'd*, 822 F.2d 55 (4th Cir. 1987), as well as a recent decision of the Wisconsin Supreme Court, *see Mortier v. Town of Casey*, 154 Wis. 2d 18, 452 N.W.2d 555 (1990), *cert. petition filed*, No. 89-1905 (June 5, 1990),[2] and early rulings of New York state courts, *see Long Island Pest Control Ass'n v. Town of Huntington*, 72 Misc. 2d 1031, 341 N.Y.S.2d 93 (Sup. Ct. 1973), *aff'd*, 351 N.Y.S.2d 945 (App. Div. 1974). It also is consistent with the published views of the EPA. *See* 40 Fed. Reg. 11697, 11700 (1975).

To be sure, contrary decisions have been rendered by the California Supreme Court, *see People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 204 Cal. Rptr. 897, 683 P.2d 1150 (1984), and two courts which adopted and followed the California Supreme Court's analysis, *see COPARR, Ltd. v. City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989), *appeal pending*, No. 89-1341 (10th Cir.); *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990).

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[2] Respondent has been advised that the *Mortier* petition is currently pending before this Court. The issues presented in this case and in *Mortier* are substantially the same, although the factual context differs, and thus the decision on certiorari in this case should be identical to that reached in *Mortier*. Respondent agrees with Petitioner that, in the event that this Court grants the petition in *Mortier*, it should grant the petition in this case as well.

Yet the emerging trend in the case law plainly is contrary to the California Supreme Court's decision, and suggests that the current conflict will be both insignificant and short-lived.

Both the lower court in this case, and the federal courts in *Maryland Pest Control Ass'n*, carefully considered and rejected the conclusions of the California Supreme Court. *See Professional Lawn Care Ass'n v. Village of Milford*, App. 8a-11a; *Maryland Pest Control Ass'n v. Montgomery County*, 646 F. Supp. 109, 111 n.2 (D. Md. 1986), *aff'd*, 822 F.2d 55 (4th Cir. 1987).[3] If the Tenth Circuit follows the decisions of its sister circuits in resolving the appeal in *COPARR, Ltd. v. City of Boulder*, No. 89-1341, then no conflict will exist among the federal courts, and the disagreement with state courts can be resolved in later litigation in the federal and state courts. If the decision of the Tenth Circuit is contrary to the decisions of the Fourth and Sixth Circuits, this Court can then review the federal conflict created by that decision in light of the rationale of that decision.

As such, the concerns recently voiced by Justice Stevens in voting to deny a petition for certiorari in *McCray v. New York*, 461 U.S. 961 (1983), are fully applicable to this case:

> I believe that further consideration of the substantive and procedural ramifications of

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[3] It should be noted that the California Supreme Court's decision in *County of Mendocino* also was rejected by the California legislature. Shortly after *County of Mendocino* was rendered, the California legislature enacted a new law for the specific, stated purpose of overturning the *County of Mendocino* decision. *See* Assembly Bill No. 2635, 1984 Cal. Laws ch. 1386, Cal. Code § 11601.1, §3.

> the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system.

Id. at 962.

The issue of FIFRA preemption of local regulation of pesticide use presents a classic case for deferral of review by this Court. This Court has frequently noted that a conflict should be allowed to ripen before being reviewed by this Court. As Justice Frankfurter has written: "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950).

II. THE COURT BELOW APPLIED ESTABLISHED PREEMPTION PRINCIPLES AND REACHED THE FAIR AND CORRECT RESULT

Petitioner strives mightily to convince this Court that the decision of the Sixth Circuit in this case is faulty and anomalous. *See* Petition for a Writ of Certiorari, at 13-18. This argument is belied by the careful and detailed analysis set forth in the opinion below. The Sixth Circuit applied standard preemption analysis to the question presented, and reached the result required by the language, legislative history, and administrative construction of FIFRA.

Petitioner seeks to avoid the lower courts' careful preemption analysis by positing a more strict standard in analyzing federal preemption of state and local police powers. *See* Petition for a Writ of Certiorari, at 13-14. Yet, this Court has never held that a different analysis applies or that police power areas are

somehow shielded from preemption. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). If congressional intent so commands, police power areas are preempted just as any other area of state and local power. *Id. Cf. Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 (1981) ("This Court has upheld as constitutional any number of federal statutes enacted under the commerce power that pre-empt particular exercises of state police power.") (citations omitted).

Here, the Sixth Circuit properly found clear congressional intent to preempt local regulation of pesticide use. The court noted that FIFRA is a comprehensive statute which expressly confers regulatory power upon the federal government and the states, but withholds such power from local governments. *See* App. 4a-5a, 10a (citing 7 U.S.C. §§ 136(aa), 136f(b), 136r(b), 136t(b), 136v). The court further found that the preemptive intent demonstrated by the statutory framework is confirmed by the legislative history of the 1972 amendments to FIFRA. App. 5a-6a, 9a-12a. This conclusion is amply supported; the prevailing committee reports in both the House and Senate affirmatively rejected local regulation of pesticide use. *See* H.R. Rep. No. 511, 92d Cong., 1st Sess. at 16 (1971); S. Rep. No. 838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993, 4008.[4] As the court below noted, the committee

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[4] Petitioner incorrectly suggests that the legislative history reflects a "stalemate" and lack of "definitive resolution" over whether to preempt local regulation. *See* Petition for a Writ of Certiorari, at 5, 13. There was no dispute in the House of Representatives, however; the report of the House Agriculture Committee clearly expresses preemptive intent. *See* H.R. Rep.

reports expressed "the belief that the state and the federal governments could regulate pesticides adequately without subjecting the pesticide industry to thousands of regulatory jurisdictions." App. 5a.

Petitioner's second argument is that the preemptive intent does not extend to the type of local regulation at issue here, which petitioner describes as "public notice" regulation. *Id.* at 14-18.[5] This argument, which

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511, *supra*, at 16. While Senate committees voiced differing views on the issue, it was the report of the Senate Agriculture and Forestry Committee—which explicitly stated that FIFRA "should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction over pesticides and the regulation of pesticides," S. Rep. No. 838, *reprinted in* 1972 U.S. Code Cong. & Admin. News at 4008—that was placed in the Congressional Record the day of the Senate vote and that represents the prevailing Senate view. *See* 118 Cong. Rec. S15893 (daily ed. Sept. 26, 1972).

[5] Petitioner inaccurately states that the district court in *Maryland Pest Control Ass'n v. Montgomery County*, 646 F. Supp. 109 (D. Md. 1986), *aff'd*, 822 F.2d 55 (4th Cir. 1987), "never considered whether this congressional intent to preempt local regulation extended to matters, such as public notice, that are wholly outside FIFRA's reach." Petition for a Writ of Certiorari, at 8. In fact, the *Maryland Pest Control* court considered and rejected *precisely* the argument advanced by Petitioner. The court stated:

> Defendants make a final contention that even assuming that local governments are not authorized under FIFRA to regulate the sale and use of pesticides, the ordinances in question here do not constitute such regulation. They argue that the ordinances are simply consumer information legislation. A rose (or as the plaintiffs see the legislation, a thorn) by any other name is still a rose, and the ordinances, however characterized by defendants, clearly constitute regulation. They require commercial applicators of federally reg-

relies upon a mislabeling of the Milford ordinance, fails.

In this case, the Milford ordinance clearly regulates pesticide "use," and the Sixth Circuit so found. App. 7a-8a. The ordinance is directly solely at "users of pesticides," a phrase defined to mean any person "who applies or causes pesticides to be applied . . . ." Ordinance No. 197, § 1(B)(1), App. 35a. Moreover, the ordinance imposes mandatory requirements governing the use and application of pesticides within Milford, and *requires* registration, *requires* advance notification, and *requires* postings after pesticide applications. *Id.* §§ 3(A), 5(A), 5(B), App. 36a, 38a-39a. If any of these requirements is not met, the "user of pesticides" who makes the application is subject to penalties in the nature of fines. *Id.* § 7, App. 39a.

The type of regulation attempted by Milford plainly falls within the regulatory ambit of FIFRA. Federal courts, like the court below, have concluded that FIFRA is a "comprehensive regulatory statute," which regulates "the *use*, as well as the sale and labeling, of pesticides." *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 991-92 (emphasis added). For purposes of FIFRA, "use" of pesticides includes *application* of

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> ulated pesticides to post property to which pesticides are applied and to disseminate information to their customers regarding the application of the pesticides. If these requirements are not met, the applicators are subject to fine. Clearly the ordinances are intended to control conduct concerning the use of federally registered pesticides and constitute "regulation" which may be imposed under FIFRA only by legislation enacted by the Maryland General Assembly.

646 F. Supp. at 113.

pesticides. *See* 7 U.S.C. §§ 136(e), 136(ee); *see also* 7 U.S.C. § 136b(a); 40 C.F.R. §§ 171.1-171.11.

Milford also is incorrect in suggesting the "public notice" regulation it seeks has not been attempted under FIFRA. The EPA explicitly interprets FIFRA to empower it to enact regulations relating to posting and notice requirements. In July 1988, the EPA proposed changes to its regulations governing worker protection from agricultural pesticides which would specify what notification is required, whether the warning must be oral or posted, and what language and symbols the warning must contain. *See* EPA Worker Protection Standards for Agricultural Pesticides, 53 Fed. Reg. 25970 (to be codified at 40 C.F.R. §§156 and 170).[6] Furthermore, the regulatory framework established by FIFRA does not confine the ability to regulate pesticide use to the EPA. Under the statute, *states* are explicitly granted authority to en-

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[6] In the same proposed regulation, the EPA stated its interpretation of "use" under FIFRA:

> The regulation incorporates a definition of "use" which covers numerous activities in addition to application of pesticides, all of which the Agency has determined are necessary steps to assure the safe use of pesticides and the prevention of unreasonable adverse effects on workers [§ 170.9(a)]. These activities occur prior to application, during application, and after application. This definition of "use" includes, but is not limited to, application, allowing or arranging for application, making necessary preparations for application, supervising application, and taking any required post-application actions.

53 Fed. Reg. at 25979. The EPA thus construes FIFRA to cover precisely the types of activities regulated by the Milford ordinance, and defines those activities as the "use" of pesticides.

act "public notice" regulation of pesticide use, and some have already done so. *See New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 117 (2d Cir. 1989) (upholding New York "public notice" regulation). In short, the FIFRA scheme permits *statewide* pesticide regulation which fully addresses the concerns which apparently motivated the Milford ordinance, while honoring Congress' intent to avoid piecemeal, potentially inconsistent, and unduly burdensome regulation of pesticide use by thousands of local governments.

Finally, petitioner's attempt to characterize the preemption decision below as overbroad, by assuming areas of regulation precluded by the decision, does not advance this Court's analysis. The specific areas and types of regulation noted by petitioner, *see* Petition for a Writ of Certiorari, at 17-18—none of which are at issue in this case—are already subject to regulation by the federal government and the states under FIFRA. There is simply no "gap" in the comprehensive sweep of the FIFRA regulatory scheme which permits the intrusion of local government regulation.

CONCLUSION

The conflict alleged in the petition is neither significant nor ripe for review by this Court, and the decision below applied well-settled peremption analysis and reached a fair and correct result. The petition for a writ of certiorari should be denied by this Court.

Respectfully submitted,

JOSEPH D. LONARDO
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6311

Attorneys for Respondent

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Patti A. Goldman
(Counsel of Record)
Alan B. Morrison
Brian Wolfman

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Village of Milford urges the Court to grant the petition in this case, along with the petition in *Wisconsin Public Intervenor v. Mortier*, No. 89-1905. The United States urges the Court to hear the *Wisconsin Public Intervenor* case because it concludes that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 *et seq.*, does not preempt the local pesticide regulation at issue in that case. However, because the reasoning that it used to reach that result would also lead to upholding the Village of Milford's public notice ordinance, the United States suggests that the Court hold this case pending the outcome of the *Wisconsin Public Intervenor* case. Br. at 16 n.16. We disagree.

This Court should hear this case along with the *Wisconsin*

Public Intervenor case for two reasons. First, while the Village of Milford shares the United States' view that FIFRA does not preempt all local regulation of pesticide use, the Court may reach a different conclusion. Indeed, twice in its brief, the United States states that "[o]n the merits, the issue is close," Br. at 3, and "the preemption issue is not without difficulty." *Id.* at 15. Thus, this Court may well disagree with the United States on this "close" question, which leads to the second reason why the Court should hear both cases together.

The two cases raise identical legal questions only if the Court decides either (1) that FIFRA preempts all local pesticide regulation of any kind, in which case it would affirm the judgments in both cases below, or (2) that FIFRA preempts virtually no local regulation, in which case it would reverse both judgments. However, the Court could, for reasons set forth in our petition, take an intermediate position and hold that FIFRA preempts some, but not all, local regulation. In that case, the Court must determine whether the particular local ordinances can co-exist with federal regulation.

Indeed, the United States recognizes that, if FIFRA does not expressly preempt all local pesticide regulation, then "local government ordinances are subject to the usual preemption analysis given to such local ordinances." Br. at 8. However, the Court cannot apply the "usual preemption analysis" in a vacuum; rather, it must determine whether the particular regulation interferes or conflicts with the federal regulatory scheme.

Applying this analysis, the Court might well reach different conclusions with respect to the two local regulations because they are at opposite ends of the spectrum — one essentially reaching regulatory judgments at odds with the Environmental Protection Agency's and the other regulating public notice, a matter wholly outside of FIFRA's reach. Thus, the Court

might decide that the Wisconsin regulation is preempted, in whole or in part, because it enables the local government to revisit many of the scientific and technical judgments made by EPA under FIFRA. However, that determination does not preclude a ruling that FIFRA permits a local public notice ordinance, like Milford's, since that type of requirement presents no interference or conflict with federal regulation.

While the United States' conclusion that local permitting systems do not undermine the federal scheme would presumably allow local notification ordinances like that of the Village of Milford, a decision that FIFRA preempts the more intrusive local regulation may have little bearing on more modest local notice measures. In order to resolve the local preemption questions under FIFRA in a reasoned and complete manner, and to promote judicial economy, the Court should have both cases before it when it decides the extent to which FIFRA preempts local regulation.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the Court should grant the petition for a writ of certiorari and hear this case along with *Wisconsin Public Intervenor*.

Respectfully submitted,

Patti A. Goldman
(Counsel of Record)
Alan B. Morrison
Brian Wolfman

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

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SUPPLEMENTAL BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

JOSEPH D. LONARDO
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6311

Attorney for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Pursuant to Supreme Court Rule 15.7, respondent Professional Lawn Care Association of America ("PLCAA") submits this brief to advise this Court of recent matters which are relevant to the pending petition for writ of certiorari in this case.

On January 14, 1991, this Court granted the petition for writ of certiorari in *Wisconsin Public Intervenor v. Mortier*, Case No. 89-1905. On January 15, 1991, oral argument was held in *COPARR, Ltd. v. City of Boulder*, Case No. 89-1341 (10th Cir.), a case which, like the *Village of Milford* case, raises the issue of preemption of local ordinances by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") in the context of a local ordinance requiring notification of pesticide application. Later that day, the Tenth

Circuit ordered abatement of the *COPARR* appeal pending this Court's ruling in *Mortier*. *See* Order, *COPARR, Ltd. v. City of Boulder*, No. 89-1341 (10th Cir. Jan. 15, 1991).[1]

In view of these developments, PLCAA now urges this Court to grant the pending petition of Milford for writ of certiorari. While PLCAA initially opposed Milford's petition for writ of certiorari on the ground that the Sixth Circuit had correctly decided the case, current circumstances compel a different conclusion. Only by hearing this case in conjunction with *Mortier* will this Court ensure that the question of FIFRA preemption of local ordinances is addressed comprehensively and in a manner which will avoid needless future litigation.

While the *Village of Milford* case and *Mortier* both involve the broad question of FIFRA preemption of local ordinances, the cases present that question in significantly different factual contexts. *Mortier* involves a local ordinance which requires receipt of a permit before certain pesticide applications may be made. *See Mortier v. Town of Casey*, 154 Wis. 2d 18, 452 N.W.2d 555, 556 (1990); Pet. for Writ of Certiorari, *Wisconsin Public Intervenor v. Mortier*, No. 89-1905, at 15-16 (June 5, 1990). So far as respondent PLCAA can determine, no party to *Mor-*

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[1] Counsel for respondent PLCAA also serves as counsel for appellants in the *COPARR* appeal. The district court in *COPARR, Ltd. v. City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989), had held that a local ordinance requiring notice of pesticide application was *not* preempted by FIFRA. That decision is the only federal decision finding that FIFRA does not preempt local regulation, and it is directly contrary to the decision of the court below in the *Village of Milford* case.

tier has argued that the scheme created by the Town of Casey ordinance does not constitute regulation of pesticide use within the meaning of FIFRA.

In this case, petitioner has made precisely that argument. Petitioner has asserted that the Milford ordinance challenged here regulates "public notice, a matter wholly outside of FIFRA's reach." Reply Br. in Support of Petition for a Writ of Certiorari, at 2; *see also Professional Lawn Care Association v. Village of Milford*, 909 F.2d 929, 932 (6th Cir. 1990).

Thus, even if this Court concludes in *Mortier* that FIFRA *does* preempt local regulation of pesticide use, the FIFRA preemption question arguably may not be settled conclusively. Instead, litigation will undoubtedly ensue about whether ordinances like that challenged here constitute regulation of pesticide use, so as to be included within the preemptive sweep of the statute. As such, there is a significant risk that this Court, and other courts, will again be asked to address the FIFRA preemption question in the future.[2]

Given these circumstances, respondent PLCAA urges this Court to grant the pending petition in this case and to consider this case and *Mortier* jointly.

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[2] This risk is considerable. The argument that local ordinance notification requirements do not constitute regulation of pesticide use has been raised by the Village of Milford in this case, by Montgomery County in *Maryland Pest Control Ass'n v. Montgomery County*, 646 F. Supp. 109, 113 (D. Md. 1986), *aff'd*, 822 F.2d 55 (4th Cir. 1987), and by the City of Boulder in the pending *COPARR* appeal. Moreover, as the Solicitor General noted in his *amicus* brief in *Mortier*, the question of FIFRA preemption of local regulation "arises frequently." Brief for the United States as *Amicus Curiae*, *Wisconsin Public Intervenor v. Mortier*, No. 89-1905, at 5.

See Supreme Court Rule 27.3. In prior terms, this Court has taken and jointly considered cases presently very similar issues, yet arising from different factual contexts, in order to conclusively resolve unsettled areas of law.[3] By following such a procedure in this case, this Court would determine the questions surrounding the preemptive effect of FIFRA with finality, avoid potential future litigation, and advance the interests of judicial economy.

Respondent would note that granting the petition in this case would not delay this Court's resolution of *Mortier*. Respondent is authorized to represent on behalf of petitioner in this case, that, should the pending petition be granted, the parties to this case will comply with the briefing and argument schedule governing *Mortier*.

For the foregoing reasons, respondent PLCAA respectfully urges that this Court grant the petition for a writ of certiorari and hear this case in conjunction with *Mortier*.

Respectfully submitted,

JOSEPH D. LONARDO
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6311
Attorney for Respondent

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[3] *See, e.g., Abington School District v. Schempp*, 374 U.S. 203, 205 (1963) ("These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible. While raising the basic questions under slightly different factual situations, the cases permit of joint treatment.").